

**BENCH AND CANADIAN BAR ASSOCIATION
LIAISON COMMITTEE
MINUTES OF MEETING
FRIDAY, DECEMBER 5, 2008**

In attendance: Chief Justice Richard, Chief Justice Lutfy, Justice Létouneau, Justice Sharlow, Justice Lemieux, Justice Phelan, Prothonotary Aronovitch, Ms. Chantelle Bowers, Mr. Andrew Baumberg, Mr. Simon Barker, Ms. Kerri Froc, Mr. Peter Grant, Mr. Brian Evernden, Mr. Guy Dufort, Mr. Martin Masse, Ms. Susan Beaubien, Mme Murielle Brazeau

Regrets: Justice Sexton, Justice Heneghan, Justice O'Reilly, Mr. Raymond Guenette, Mr. Mario Bellissimo

1- Opening Remarks

- Mr. Barker noted that photos were to be taken for the CBA annual report.

2- Minutes (June 6, 2008)

- Approved, with minor corrections for typographical errors

CBA ITEMS:

3- New Members

- Mr. Barker welcomed new committee members:
 - a. Mr. Waldmen is replaced by Mr. Bellissimo (Citizenship & Immigration)
 - b. Ms. Elliot is replaced by Ms. Beaubien (IP)
- Chief Justice Lutfy introduced Mme Brazeau, Deputy Chief Administrator (Registry)

4- Specialized Liaison Group Updates

(a) Indigenous Bar ~ Aboriginal Law Bar

- Mr. Grant noted a meeting was held October 23 to review draft practice guidelines, with significant interest among the Aboriginal bar in the process
 - Next meetings: December 10 and then Spring 2009
- Justice Lemieux noted the recent meeting was positive, completing a review of the guidelines, which are “best practices” for aboriginal law litigation (e.g., discovery of documents, managing witnesses at trial, etc.) based on comments from Committee members and outside experts
- the guidelines include litigation practices that are in use in the Court, reflecting to some degree what is already being done, and take advantage of the flexibility in the existing rules
- the committee aims to adopt the guidelines in the Spring after consultation with members
- Chief Justice Lutfy noted that this is a long-term project to better our practice, likely to continue over many years
- it is anticipated that the guidelines will be applied initially in pilot projects
- Mr. Grant noted, in response to a question regarding communication of the guidelines to the Bar, that the key component is that the Court, Justice, CBA, and the IBA have come together to discuss the project, and it will be disseminated in the aboriginal law bar, at CLE's, etc.
- the guidelines should be brought to the attention of litigants / counsel less familiar with aboriginal litigation
- Chief Justice Richard noted interest by the Bar to have practice guidelines considered by the Rules Committee for formal amendments
- Justice Lemieux noted that the guidelines are complementary to the recent Rules Committee work on expert evidence, and do not require amendments to the rules at this stage

(b) Immigration Law

- Update from Mr. Barker regarding e-service and decision-makers items from the last meeting: pending further CBA work, deferred to the next meeting
- Chief Justice Lutfy noted there were less than 6000 files this year, compared with 11,000 a few years ago, yet the pending inventory at the IRB has gone from 20,000 to 50,000 files
- In a few years, there may be a wave of new cases, so the Court is now re-assessing the practice / rules in immigration and refugee matters
- It will likely be brought to the Immigration Bar Liaison Committee (Justice Snider, Chair)
- Ms. Froc noted the CBA position in this was sent to the government and is on its web site

(c) Intellectual Property

- Update from Ms. Beaubien regarding the IP User's Group, chaired by J. Hughes
- Overall the process is going well and the next meeting is February 26 in Montreal
- Discussion regarding early trial dates and reform of the summary judgment rule:
 - proposal to place new patent cases on a 2-year fast track – mixed reaction from Bar
 - the bar should look at procedures to collapse time-line rather than summary judgment
 - early trial scheduling is problematic if there is major disagreement between parties on the time needed – Court may be reluctant to set major trial date if parties don't agree
 - some Bar members queried whether the Court has resources to manage all these cases
- Chief Justice Lutfy responded that if the Bar wants to streamline the process, the Court is open and does not impose time-lines – onus is on Bar to request trial dates early in process
- Re resources, funding is being requested for a 7th prothonotary position in 2009 and eventually an 8th position thereafter
- finally, the Court is considering a Practice Direction to improve IP practice efficiency
- Chief Justice Richard noted the FCA expedites interlocutory matters where there is an appeal
- the 2 Courts are working together to ensure an expeditious hearing
- Mr. Barker noted the Bar recognizes the Federal Courts as good courts to do business
- Prothonotary Aronovitch added that the Court is responsive both to litigants wanting to proceed expeditiously as well as to those wanting a slower process
- parties prepare pre-trial charts to assess the length of time needed for trial – when the parties are agreeable, even if there is a difference of opinion on the time needed, her experience is that the Court sits down with parties and finds a reasonable compromise that is implemented by the Judicial Administrator

(d) Toronto

- Justice Phelan noted that there was a podium mock-up in Toronto, which is an improvement over previous version
- Chief Justice Richard confirmed that the federal courts will adopt the security procedures used by the provincial courts (e.g., ID issued by law society) to allow lawyers to enter
- Mr. Grant noted that in B.C. there is no security restriction for access
- Mme Brazeau noted Toronto has the largest workload but insufficient resources – she is devoting considerable attention to this situation
- Mr. Barker added that the perception from the Bar is that the Toronto registry accepts documents quickly enough, but that there is a delay with subsequent steps

5- Identification of vulnerable persons in Court decisions

- deferred

6- Common Book of Authorities

- a notice issued April 15, 2008, for Volume I, with 40 immigration / refugee law cases
- volume I was printed, distributed to the Court, and made available in courtrooms
- these cases are available on the Court web site on *Notices to the Profession* page
- the project has been raised with the maritime bar, the IP bar, and the aboriginal law bar
- the aboriginal law bar proposed 49 cases for a possible Volume II of the list

- If other specialized bar groups wish to propose a list, they are welcome
- Chief Justice Richard added that the Federal Court of Appeal is open to receiving proposals

7- Expert witnesses

- This will be discussed under the Rules Committee report by Chief Justice Richard

8- Continuing Legal Education Conference (Dublin, August 2009)

- Ms. Froc / Canadian Judicial Council met with Irish judges re court administration [Courts are managed by a professional board with representation from the Bar, judiciary, and public]
- CBA Conference details are on its web site

COURT ITEMS:

8. Federal Court of Appeal Update (Chief Justice Richard)

- an annual meeting was held last September, with about 80 participants, including some members of the Federal Court, Quebec Courts, administrative tribunals, and the Bar – the focus of the education component was on Dunsmuir and other administrative law issues
- Chief Justice Richard retires July 30, 2009
- Justice Linden, Justice Desjardins, and Justice Décary are also retiring in the coming year, and Justice Sexton and Justice Létourneau will be adopting supernumerary status
- the next Court meeting will be held as a special seminar entitled « Retrospectives and Perspectives on the Federal Court of Appeal » to be held on June 25, 2009
- a special swearing-out ceremony will be held June 26, 2009
- furthermore, there is conference in April 2009 hosted by the Federal Court of Appeal (meeting of the Association of Supreme Administrative Jurisdictions)

Rules Committee

- The last meeting was held Friday, November 28, 2008, with various sub-committees working on specific projects:
- Sub-committee on Summary judgment – the plenary Rules Committee reached consensus on proposed amendments, which will now be put into legislative form – the final blue-stamped copy is expected early next week and for pre-publication in Part I of the *Canada Gazette*, allowing for comment from the public
- Sub-committee on Expert Witness – a final report was submitted to the plenary Rules Committee and all agreed that it would form the basis of instructions to the Department of Justice drafters. Once formal amendments are drafted, these will be published in the *Canada Gazette* for comment. Of note in the report, there is proposed a Code of Conduct for expert witnesses, limitations on the number of experts, and introduction of expert witness conferences.
- Proposed amendments to Rule 395 – these are to allow for the Registry to send orders and reasons to parties by registered mail, *or by electronic means* such as fax or e-mail. This proposal was accepted by the Rules Committee in principle, subject to a few verifications with the actual practices followed by the Registry to ensure that parties will in fact receive a copy of the order or decision by one means or another.
- The Bar is of view that registered mail version is not required if it is sent by fax or email with proof of receipt, though it was noted that not all counsel rely on fax / email, and there are some potential failure scenarios, which may be of concern for unrepresented litigants. There may be proposed an option for fax, email, or registered mail, *but with the possibility of requesting a confirmation*
- Proposed amendments to Rule 306 and 307 – these amendments relate to the duplication of affidavits on the Court file. The proposal would be that within 30 days after issuance of a notice of application, an applicant shall serve (but not file) its supporting affidavits and

documentary exhibits, and shall file proof of service. The copies received by the Federal Court of Appeal should not be affected, given the protections under Rules 309 and 310. This proposal will be considered by the Department of Justice drafters as well.

- Mr. Masse asked that where the tribunal record was filed in court, might the parties be able to rely on the fact that the record has already been filed?
- In response, it was noted that the Federal Court of Appeal requires multiple copies. The Bar should submit a formal proposal to the Rules Committee.
- Rule 127 – service of originating documents on Crown are made via registry, but appeals to the Federal Court of Appeal are not covered – the practice is inconsistent and requires amendment.

9- Federal Court Update (Chief Justice Lutfy)

- With considerable innovation, creativity and patience, Justice O'Reilly worked with the Chief Herald of Canada to arrive at a new Coat of Arms for the Federal Court, launched on Oct 24th at a ceremony at Rideau Hall with the Governor General
- The Court's annual meeting in October 2009 will be held in Montreal, with a focus on Intellectual Property law issue, and will involve practitioners
- The Chief Justice also reported on the election of Justice Gauthier as Vice President of the Comité Maritime Internationale
- Mme Aronovitch provided an update regarding prothonotaries, thanking the CBA for its resolution asking the government to provide a substantive response on the "Adam's Report" (Special Advisor to the Minister of Justice regarding prothonotaries's compensation)

10- Registry Update

- Mme Brazeau noted that the Federal Court and Federal Court of Appeal Registry will move in Ottawa by January 12 – counter service changes on this date – notices will be posted for the Bar and public
- She also reported on-going efforts to improve Court / Registry technology, electronic systems and modernization overall

QUESTIONS OF GENERAL INTEREST:

11- Next Meeting

- It was proposed to hold the next meeting on June 25th in the morning

12- Other

13- Closing Remarks